



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

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October 10, 2018

The Honorable Robert D. Mariani
U.S. District Court, Middle District of Pennsylvania
William J. Nealon Federal Bldg. & U.S. Courthouse
235 N. Washington Avenue
Scranton, PA 18503

**Re: *Commonwealth of Pennsylvania v. Navient Corporation et al*, No.
3:17-cv-01814-RDM**

Dear Judge Mariani:

Thank you for your time today on our telephonic conference call regarding the Privacy Act discovery dispute referenced in the Commonwealth's August 17, 2018 letter (Document 35). As you requested, the Commonwealth writes to submit the order and transcript from a recent hearing on the State of Washington's motion to compel similar student loan borrower data from Navient in the case of *State of Washington v. Navient Corporation, et al.*, Case No. 17-2-01115-1 (King County Sup. Ct.). At this hearing, the Court ordered Navient to produce the requested data to the State of Washington, rejecting many of the same arguments that Navient made on today's conference call. Enclosed please find a copy of the court's order and transcript, with a discussion of the Privacy Act dispute on pages 5-18.

On today's call you also inquired as to whether either party was aware of a precedent regarding Navient's argument that it should not be ordered to produce the data because it does not have legal ownership of the data. On page 7 of the enclosed transcript, the attorney for the State of Washington references such a case: *In re Bankers Trust Co.*, where the Sixth Circuit held that *actual possession, custody or control* (not legal ownership) was determinative under FRCP 34(a). See *In re Bankers Trust Co.*, 61 F.3d 465, 469-471 (6th Cir. 1995) (holding that records legally owned by the Federal Reserve but in the actual possession of a bank were subject to discovery from the bank rather than the Federal Reserve).

Respectfully,
/s/ Nicholas Smyth

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Exhibit A

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Page 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

)
STATE OF WASHINGTON,)
)
)
Plaintiff/petitioner,)
) King County Superior Court
v.) No. 17-2-01115-1 SEA
)
NAVIENT CORPORATION, et al.,)
)
)
Defendant/Respondents)

Verbatim Transcript from Recorded Proceedings
Before The Honorable Veronica Alicea-Galvan

September 21, 2018

King County Courthouse
Seattle, Washington

TRANSCRIBED BY: Grace Hitchman, AAERT, CET-663

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1 (The Honorable Veronica Alicea-Galvan presiding)

2 (Friday, September 21, 2018)

3 --oo--

4 (Recording begins 9:59 a.m.)

5 THE COURT: Good morning, everyone. You may be
6 seated. This is Washington v. Navient, 17-2-01115-1 SEA.

7 A couple of things before we begin. I'm going to
8 listen to argument in this case. With regard to any issues
9 that I have not fully decided at the conclusion of the
10 argument, those issues will be rendered in a written
11 opinion. So I just kind of want to let -- there's a lot of
12 balls in the air on these matters, and I want to make sure
13 that I have those spelled out accordingly.

14 So with that in mind, let's note the appearances for
15 the record. On behalf of the state of Washington, please?

16 MR. ROESCH: Good morning, Your Honor. Benjamin
17 Roesch, assistant attorney general.

18 MS. SMITH: Good morning, Your Honor. Shannon
19 Smith, assistant attorney general.

20 THE COURT: Good morning.

21 MS. LEVY: Good morning, Your Honor. Jennifer Levy
22 from Kirkland and Ellis, Navient.

23 MS. SILVERMAN: Good morning, Your Honor. Kristin
24 Silverman from Calfo Eakes for defendant.

25 MR. SHUMSKY: Good morning. Mike Shumsky from

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1 Kirkland and Ellis for Navient defendant.

2 MS. BEEBE: Good morning. Lauren Beebe from
3 Kirkland and Ellis.

4 THE COURT: Okay. So in terms of making this as
5 easy as it can be, I received two different sets of motions
6 to take judicial notice of adjudicative facts. As those
7 issues pertain to the 12(c) motion, I can let you know that
8 there's going to be some facts that the Court takes notice
9 of and others that the Court does not take notice of because
10 it doesn't help the Court.

11 In terms of argument, I'm going to allow the State
12 to present their 12(c) motion on certain defenses first, and
13 then we'll hear from respondent on those issues. And then
14 I'll hear your rebuttal arguments.

15 With respect to -- then we'll go to respondent's
16 12(c) motion. We'll hear from your response and then we'll
17 hear their rebuttal.

18 So I'm going to try to keep these as contained as I
19 can, even though I know that they spill into each other
20 significantly.

21 So -- and with regards to the motion to compel, now,
22 was I correct in that the parties requested oral argument on
23 the motion to compel?

24 MR. ROESCH: Your Honor, Navient requested oral
25 argument.

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1 THE COURT: Okay. All right. So let's start with
2 that motion. And then we'll get to the 12(c) motions.

3 MR. ROESCH: Good morning, Your Honor. As I
4 indicated before, my name is Ben Roesch, here on behalf of
5 the State.

6 The State's motion to compel seeks production of
7 specific borrower files. These data include personally
8 identifying information for those borrowers. These
9 borrowers have, by the way, all submitted complaints either
10 to the Consumer Financial Protection Bureau, to the
11 Washington attorney general's office, or to the Better
12 Business Bureau. And I can say with about 99.9 percent
13 confidence -- only because I didn't review my records this
14 morning -- that we have, in fact, interviewed all of these
15 borrowers.

16 Although the motion to compel presents some sort of
17 novel arguments in terms of federal law, these issues are
18 actually very straightforward. The objections to production
19 fall under three general categories. First, we have the
20 federal Privacy Act. Second, we have Navient's contract
21 with the Department of Education, and third, we have a
22 suggestion that it would be more convenient all around if
23 the State instead sought these documents through the Touhy
24 regulations that the Department of Education has
25 promulgated.

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1 Your Honor, let's address these in turn. First, in
2 terms of the Privacy Act, the act itself in 5 USC
3 552a(b)(11) allows production pursuant to an order of a
4 court with competent jurisdiction. There isn't an argument
5 in this case that the Court doesn't have competent
6 jurisdiction. There is personal jurisdiction over the party
7 from whom production is sought, and certainly the Court has
8 subject matter jurisdiction. And as such, the In Re Tucker
9 court was very explicit that this Court is the best suited
10 entity to determine whether the Privacy Act applies and
11 whether production should be made.

12 The regulations implementing those -- that section
13 are not to the contrary. Both the national archives and
14 their Department of Education's regulations both have an
15 exemption from the general prohibition on disclosure that
16 quotes that provision verbatim.

17 And, in addition, the Department of Education's
18 regulation at 34 CFRb(2)(d)(5) specifically provides that
19 the Privacy Act regulations aren't about whether documents
20 or data are made available to parties in litigation. It
21 says, quote, the availability of such records to the general
22 public or to any subject individual or party in such
23 litigation or proceedings shall be governed by applicable
24 constitutional principles, rules of discovery, and
25 applicable regulations of the Department.

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1 The case law is quite clear that there is no
2 privilege that arises out of the Privacy Act or its
3 regulations. And, in fact, discovery can be had through the
4 ordinary court processes.

5 Second, Your Honor, Navient suggests that its
6 contract with the Department of Education prohibits
7 production in this case. Generally, as you know, parties
8 aren't allowed to escape the operation of the Rules of Civil
9 Procedure simply by contracting around them, and that's
10 certainly not the case here. First of all, Navient explains
11 that the contractual provisions requesting prior consent
12 from the Department are there to implement the protections
13 of the Discovery Act. Well, because the Discovery Act
14 contains this exemption, which clearly applies in this case,
15 the contract neither explicitly nor implicitly authorizes
16 the withholding of these documents.

17 In addition, the Bankers Trust case explained the
18 legal ownerships of the documents it not determinative. And
19 there's no dispute here, I don't believe, that Navient has
20 possession of the data that's been requested.

21 Finally, Your Honor, there's an argument that the
22 Department's Tuohy regulations suggest it to be more
23 convenient for the Court to require us to go to the
24 Department of Education. The Tuohy regulations, first of
25 all, by their own terms, don't purport to apply here. They

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1 apply where documents are, in fact, sought from the
2 Department of Education, its employees, or its special
3 employees, and that's not the case here. The documents are
4 being sought by Navient.

5 More to the point, the procedure proposed by Navient
6 would only add steps as, in fact, the Bankers Trust case
7 explains, rather than the relatively straightforward
8 discovery procedures. We have a situation where a separate
9 request is made to the Department. The Department, if it
10 decides to grant the request, has to go get those documents
11 from Navient if it wants to produce them, or it can order
12 Navient to produce them, which is exactly what we're here
13 for.

14 The proposed -- the Tuohy regulations aren't more
15 convenient in this case. They only add potential steps and
16 potential side litigation in federal court over the
17 Administrative Procedures Act.

18 THE COURT: Thank you.

19 MR. SHUMSKY: Good morning, Your Honor. Thanks for
20 the opportunity to argue the motion to compel. I understand
21 that it is somewhat unusual to be hearing an argument on
22 this. We bring it to your attention because we think that
23 there are some very significant issues and concerns that the
24 Court ought to consider before it orders production.

25 Let me be clear at the outset here, we are not

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1 taking the position that this Court has no authority to
2 enter the order that the State is requesting. The question
3 is whether or not the Court should exercise that authority
4 and what limitations the Court should order on the
5 production of this information.

6 So let me step back and talk just for a second about
7 the type of information that we're talking about. We're
8 talking about individually identifiable information that
9 discloses borrowers' names, home addresses, telephone
10 numbers, maybe more dangerously Social Security Numbers,
11 bank account information, credit histories, really serious
12 stuff that a lot of bad actors would like to get their hands
13 on.

14 THE COURT: Let me stop you right there. Aren't
15 there things in effect, protective orders, orders to seal,
16 filing certain documents that do redact that personal
17 information and any complete documents under an order for
18 seal? Aren't there protections that allow for that? I
19 mean, we have cases here that involve banks, that involve
20 multibillion dollar corporations that oftentimes contain
21 very sensitive and personal information, and yet we manage
22 to handle all of those cases.

23 MR. SHUMSKY: Sure, Your Honor. That's exactly
24 right. No question. There's a protective order in place,
25 and I have no reason to think -- Navient certainly isn't

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1 taking the position that Ben can't safeguard this
2 information, that he's going to improperly use it or that
3 somebody in his office is going to improperly use it, that
4 they're going to leak it to a newspaper. But what the
5 Department of Education has required and what federal law
6 has required is a series of very highly reticulated data
7 security and information security procedures that are
8 designed to prevent somebody from hacking into a computer
9 system that contains this information and unlawfully
10 accessing it.

11 And, you know, Ben talked about some of the
12 authorities, but there's Privacy Act regulations that govern
13 data security. There are NARA regulations that govern data
14 security practices and procedures. There are Department of
15 Education regulations that govern all of that. Navient's
16 contract governs all of that.

17 We explained in our brief at some length some of
18 the, I'll call them cybersecurity, features that we need to
19 build into our systems. And I would add, there's one other
20 statute that's relevant here. It's the FISMA, the Federal
21 Information Security Management Act, that requires the
22 federal government when it maintains -- and I should say
23 expressly applies to contractors who maintain sensitive data
24 on behalf of the government, that those companies need to
25 put in place to prevent hackers or unauthorized individuals

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1 from accessing this information.

2 So, again, I respect we've got a protective order in
3 place. We don't mean to suggest in any way that the Bureau
4 is going to be releasing or unlawfully using this
5 information. The question is whether or not the State has
6 in place data architecture and cybersecurity features that
7 are sufficient to safeguard this information, that are
8 compliant with federal law, and that meet the standards that
9 the United States Department of Education has imposed.

10 And so we have sort of two sets of concerns that
11 arise here, right? On the one hand, we have half a dozen or
12 more provisions of the contract, which we laid out at Pages
13 4 to 5 of our opposition that are designed to locate this
14 information exclusively within the federal government's
15 power to control and dispose of as it sees fit. And then
16 secondarily, consistent with the contract pursuant to the
17 contract, a series of technical specifications and
18 information security requirements that are designed to
19 safeguard this highly sensitive, very desirable information.

20 THE COURT: Without going down, for lack of a better
21 term, the rabbit hole of cybersecurity that you have raised,
22 doesn't the State already keep sensitive information on many
23 of its constituents or citizens or residents? And doesn't
24 it do that in the context of DSHS, in the context of a
25 myriad of other criminal cases, all of that? I mean, isn't

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1 that -- is that truly what the concern is?

2 MR. SHUMSKY: Your Honor, I have no reason to doubt
3 that the State maintains this information. What I can't
4 represent, what I'm not sure that the State can represent to
5 you today, is that the system architectures and the
6 technical specifications that they had in other places are
7 consistent with the requirements of federal law, with the
8 requirements the Department of Education has imposed, that
9 FISMA imposes and that federal law requests, the federal
10 government, federal agencies that maintain this data, to
11 impose.

12 And the position that we're taking in this case is
13 that in contemplating whether or not to issue a discovery
14 order, the question isn't just whether or not the
15 information is discoverable within the terms of CR 34. But
16 rather under CR 26(b)(1) requires you to consider what the
17 limitations are on the parties, what the burdens are on the
18 parties, what the interests at stake are in ordering the
19 production. And, in particular, whether or not there is a
20 mechanism for the party to get this information without
21 imposing an undue burden on the party from whom it's sought.

22 And we're in a really tough position, Your Honor,
23 right? We're being put in between a rock and a hard place.
24 On the one hand, the threat of violating a court order to
25 produce this data, and on the other hand, the threat of

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1 violating our contract with the United States government,
2 with the Department of Education, that bars us from
3 producing this data outside of the limitations that the
4 government, I think quite reasonably, has imposed on this
5 data.

6 And what we're asking you to consider is the fact
7 that the Department of Education has asked the State to come
8 before it and request the data. That at that point the
9 Department of Education can sit down with the state of
10 Washington and discuss the appropriate limitations that will
11 be placed on that access to ensure that only pre-cleared
12 individuals are able to access it, to ensure that the state
13 of Washington and the Bureau's computer systems have
14 sufficient safeguards in place to prevent hackers or other
15 unauthorized actors from accessing the information.

16 And given the limitations that are imposed on
17 Navient here, I think it's not crazy to say this is
18 something that ought to be worked out between the Department
19 of Education, which has taken every imaginable step to say
20 we have exclusive control and custody of these records, even
21 though we have used a contractor to build this server and
22 even though the contractor is performing functions on the
23 government's behalf. But come to the government and talk to
24 us about this so that we can defend the government's
25 interest and the Department of Education's interest in

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1 protecting this highly sensitive data.

2 And, you know, I understand Mr. Roesch's argument,
3 which is to say, well, you know, it would really be
4 duplicative at this point for us to go and ask the
5 Department of Education, because we have come into court and
6 asked the Court to order the production of this. But that
7 sort of defect or argument really is the State's own fault.
8 If they had gone to the Department of Education in the first
9 instance and made this request, it would have taken the
10 State far less effort than it took the State to file the
11 motion to compel, file a reply brief, and come into court
12 and argue their position today. The fact that they chose
13 not to do it doesn't sort of make that unduly burdensome.
14 It certainly doesn't make it unreasonable.

15 What we're asking, what the Department of Education
16 has ordered us to say to the Court and to the state of
17 Washington, is come to us. Have a discussion about this,
18 and show us that you've got the systems in place and the
19 protections in place to safeguard this information.

20 And so, again, I want to be clear. Our position is
21 not that you somehow lack the power to enter this order but
22 whether, in light of the things you need to consider under
23 CR 26 it's appropriate to do so without any consideration
24 for the Department of Education's interests, for the
25 interests of the United States government. And, you know,

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1 we respectfully submit that the appropriate way to handle
2 this is to have the state of Washington go to the Department
3 of Education, determine whether or not Ed and the state of
4 Washington can come to an agreement on the procedures and
5 restrictions that are going to apply to this data. If they
6 can, that's great. The State's going to get all of the
7 information that they're looking for. If not, they can come
8 back into court, and you at that point can make a
9 determination of whether or not to compel Navient to
10 disregard the contractual limitations that are in its
11 contract with the federal government.

12 And one very last thing, if I can just briefly point
13 out. Mr. Roesch has said they're looking for a limited set
14 of information in this case on particularly identified
15 Washington borrowers. They have already sat down with those
16 borrowers, met with those borrowers. I would add sort of
17 one addendum to all of this. I think there are 46
18 Washington borrowers that are at issue here whose data the
19 State is seeking. We understand from the State that they
20 have gotten releases from 39 of those 46 borrowers that
21 essentially waive any objection that that borrower would
22 have to the production of its information. Our
23 understanding from informal communications with the
24 Department of Education is that with those releases in hand,
25 the Department likely would release that information to the

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1 State.

2 We said to Mr. Roesch when we had a discovery
3 dispute that prompted the motion to compel, go back to the
4 other set of borrowers. Get the same releases for those
5 individuals. We'll take that to the Department of Education
6 and see if the Department of Education will give us the
7 requisite written authorization to release this information
8 to you. And the State refused to do that. They said no, we
9 want to take this to Court. We want to set a precedent. I
10 suspect we're hearing it's 46 borrowers today. Tomorrow
11 it's going to be every call record, every record that
12 Navient has, every single borrower in the system. But there
13 was a solution to this problem that the State chose to
14 forego.

15 And I think in choosing whether or not to sort of
16 force Navient into this no-good-option scenario between
17 violating a court order and violating our contract with the
18 United States government, that it's worth having the state
19 of Washington go through the procedures that the Department
20 has requested and see if there's a way to work these issues
21 out. We're willing to be a, you know, useful and helpful
22 participant in that process, but in our view, it's premature
23 and inappropriate to order us to violate our contract and
24 disregard the legitimate and significant issues that the
25 federal government has sought to assert and protect itself

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1 with the regulations and the contractual provisions we're
2 dealing with.

3 THE COURT: All right. Thank you, counsel. You may
4 be seated.

5 In looking at this issue, the Court finds and is
6 going to grant the motion to compel. The Court does not
7 find that the federal Privacy Act is a bar under these
8 circumstances, that this Court has and is a Court of
9 competent jurisdiction to grant this motion. The Court
10 finds that with regards to the contract, that a provider of
11 government services can't simply say this contract doesn't
12 allow us to; therefore, we're somehow not obligated to
13 provide this type of discovery. These are the risks that
14 governments run when they provide outside individuals to
15 contract services. There's a presumption that at some
16 point, there may be litigation, and they are no more immune
17 from the requirements of discovery than the government
18 itself would be.

19 This isn't a provision to violate a contract. This
20 is a court order. And this is not an intentional violation.
21 This is not a willful violation. This is an obligation
22 under an order of a Court of competent jurisdiction.

23 With regards to the convenience, the place that is
24 the most likely and easiest place to obtain this information
25 is from the person who holds this information. Again, you

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1 can delegate authority; you can't delegate responsibility.
2 And while the Department of Education may be ultimately
3 responsible for these loans, they have delegated certain
4 authority to Navient. And within that context of the
5 authority is the keeping of these records. And Navient is
6 the source of those. And the Court is going to grant the
7 motion to compel.

8 So I'm going to ask that you prepare an order on
9 that. We'll take all of the orders at the end that I'm
10 going to take care of today. Okay?

11 That brings us then to the plaintiff's 12(c) motion.
12 And I'm going to give each side 15 minutes -- do you want
13 certain time reserved for rebuttal?

14 MR. ROESCH: Yes, Your Honor. I would like to
15 reserve five minutes for rebuttal, please.

16 THE COURT: Okay. Five minutes for rebuttal. And
17 you may proceed.

18 MR. ROESCH: Good morning, Your Honor. The State's
19 motion should be granted for the reasons set forth in the
20 briefing and to the extent specifically provided in the
21 State's proposed order.

22 THE COURT: Let me ask a question. Why a 12(c)
23 motion?

24 MR. ROESCH: Yes, Your Honor. I think that's a fair
25 question. In this case, Navient's answer provided a lot of

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1 grist for the State to look through. For example, Navient
2 denied knowledge that would allow it to either admit or deny
3 things like whether it serviced federal and private loans,
4 whether its obligations in servicing those loans included
5 collecting payment. So there was a lot for the State to get
6 its head around. That didn't happen within 20 days.

7 We planned to present these issues in a motion for
8 summary judgment. When the defendants decided that they
9 were going to be moving for a 12(c) partial dismissal of the
10 State's claims, it seemed like an appropriate time for the
11 Court to consider the purely legal issues presented by
12 conflict preemption and, to a certain extent, the express
13 preemption provision of 20 USC 1098g.

14 THE COURT: Didn't this Court address those issues
15 somewhat in the 12(b)(6) motion that it heard?

16 MR. ROESCH: Your Honor, it did. However, the
17 procedural posture required denial of that motion based on
18 the any conceivable fact standard that applies here to both
19 of the cross motions. And so as defendants rightly pointed
20 out, it's not necessarily conclusive on the entire case.
21 We're happy for that ruling to stand and be dispositive
22 regarding the affirmative defenses, including conflict
23 preemption, but as a belt and suspenders way of closing the
24 book on those specific defenses, we want to present these
25 very clearly for the Court's consideration.

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1 THE COURT: Okay. So let's start with the issue of
2 conflict preemption. And are you also going into an issue
3 of field preemption? Is that --

4 MR. ROESCH: Well, Your Honor, it's a little bit
5 unclear whether there's a field preemption defense that's
6 being asserted here. For example, we didn't think there was
7 a statute of limitations defense that was being asserted.
8 It turns out today, there is. So, again, belt and
9 suspenders.

10 As far as conflict preemption goes, there are two
11 different types. The first is impossibility preemption.
12 That's where a party cannot comply with both state and
13 federal law. There's no suggestion that that's the case
14 here.

15 So what we're left with is obstacle preemption.
16 This is where the state law stands as an obstacle to the
17 accomplishment and execution of the full purposes and
18 objectives of Congress. That is a legal matter to be
19 decided by examining the federal statute as a whole and
20 identifying its purposes and intended effects.

21 And we believe, Your Honor, that prohibitions on
22 unfair or deceptive acts or practices by state law doesn't
23 get in the way of anything Congress intended to do with the
24 higher education act. The higher education act was intended
25 to help students, to help them finance their educations, to

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1 help them repay their loan obligations, including through
2 income-driven repayment plans. Nothing in that broad
3 purpose conflicts with the notion of borrowers not being
4 lied to or being treated unfairly.

5 So what we have is the Department of Education
6 notice of interpretation which, I think it's worth pointing
7 out under the Wyeth Levine case, is afforded some weight at
8 the most. And the amount of weight is essentially, Your
9 Honor, like an amicus brief. The Court look at how thorough
10 it is, whether it's consistent with prior positions -- it's
11 not, for the reasons we've explained in the briefing -- and
12 how persuasive it is.

13 And the Department of Education has two purposes
14 that it says state UDAP, Unfair and Deceptive Acts or
15 Practices, may conflict with. The first is uniformity.
16 Your Honor, the weight, and indeed most recent federal
17 authority on this, which was put out after the Department's
18 notice of interpretation, finds that uniformity is not a
19 purpose of the Higher Education Act and certainly doesn't
20 displace traditional state consumer protection laws in light
21 of the presumption against preemption.

22 And that's not surprising. It would be a really
23 unusual purpose of Congress to prevent the state of
24 Washington from protecting its consumer by saying you can't
25 make misrepresentations to them for the reason the company

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1 needs to be free to make those same representations to
2 borrowers all across the country. That is contrary to
3 everything we know about the Higher Education Act's purpose
4 as well as the other federal laws that apply in these areas
5 like, for example, the Federal Trade Commission action.

6 THE COURT: Let me ask a question. You have asked
7 this Court to take notice of certain adjudicative facts.
8 Some of those facts I know that you offered for the purpose
9 of their existence as opposed to for the purposes of their
10 content. How is the mere existence of those relevant
11 without the content?

12 MR. ROESCH: Because, Your Honor, it goes to -- it
13 goes to the consistency with which the Department of
14 Education has approached the issue of compliance with state
15 law and whether its servicers need to do that.

16 THE COURT: Well, let me ask a follow-up question.
17 How does this Court give any, I don't know what the word is,
18 credence, leeway to the policy decisions on how to proceed
19 from the Department of Education? We have had, certainly
20 since the inception of this case, a change in policy, a
21 significant change in policy as to how these things are
22 handled or viewed. So what weight is the Court to give to
23 agency policy with regards to, as they argue, that somehow
24 the Department of Education itself, their new policy somehow
25 preempts the consideration of this by the Court?

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1 MR. ROESCH: Certainly, Your Honor. We don't view
2 this as what the Obama administration said versus what the
3 Trump administration says. We go much further back than
4 that, in fact, to the 1992 notice of interpretation
5 regarding the preemptive effect of 34 CFR 628.411, which
6 governs the minimum requirements that a servicer must do to
7 take -- to try to collect on Folk (phonetic) loans. And
8 there -- and again, I think that was probably developed
9 during the end of the George H.W. Bush administration, put
10 out at the beginning, perhaps, now. It would have been in
11 the George H.W. Bush administration. The Department of
12 Education said the preemptive effect of these regulations --
13 and this is written into subsection O of that regulation
14 itself -- only extends so far as is necessary to allow
15 services, to allow collectors, to undertake these minimum
16 efforts.

17 So what we have -- and this, by the way, is
18 completely consistent with Congress's mandate in the Higher
19 Education Act 20 USC 1082 A-1 it instructed the Department
20 to provide minimum standards for servicers. And the
21 Department did just that. If you look at the regulation I
22 cited earlier, the words "at a minimum," "at least," appear
23 over and over and over again. And as a result, courts have
24 held all across the country that prohibitions on making
25 misrepresentations don't get in the way of --

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1 THE COURT: Meeting those minimal obligations.

2 MR. ROESCH: -- meeting those minimum requirements.

3 So there isn't a conflict between the intent to provide a
4 minimum floor for what activity needs to take place and
5 preventing people from making misrepresentations.

6 I think, Your Honor, there's also -- if I could just
7 have one moment -- there's a big difference between
8 establishing a minimum, establishing a floor, and an
9 intention to establish an exclusive set of contracts.
10 Neither the Higher Education Act nor the Department of
11 Education's own regulations purport to be exclusive. That
12 comes up for the first time, Your Honor, in this 2018 notice
13 of interpretation.

14 THE COURT: All right.

15 MR. ROESCH: Thank you.

16 THE COURT: Thank you. So I'll ask you the same
17 question, and I'm going to start off with the same question.
18 Does -- what effect does a policy of a federal agency have
19 on preemption?

20 MR. SHUMSKY: Sure. Let me unpack that in a couple
21 of different ways to Your Honor.

22 What we have from the Department of Education -- and
23 I want to be clear. We are not solely relying on the letter
24 that the Department of Education released in the Federal
25 Register recently. But what the Department of Education has

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1 done there, what it did in the Brannon case in the 9th
2 circuit in 1996 when President Clinton was the head of the
3 executive branch, what it said to the 9th circuit in 1999 in
4 the Chay case when President Clinton was running the
5 Department of Education, is to interpret the scope and the
6 reach of Section 1098g, the express preemption clause that
7 we have invoked in this case.

8 And in Brannon and in Chay the 9th circuit looked at
9 those interpretations of a federal statute, and they said
10 we're in Chevron territory. That is to say when a federal
11 agency interprets its organic statute, that interpretation
12 is entitled to deference from the judicial branch. Whether
13 it's state or federal makes no difference because they're
14 the body that was charged by Congress with interpreting and
15 implementing federal law.

16 We are not taking the position that these notices of
17 interpretation, that the positions that the Clinton
18 administration took, positions that now the Trump
19 administration is taking somehow in and of themselves are
20 preemptive. They relate to the interpretation and meaning
21 of Section 1098g. And any time a federal agency interprets
22 a statute, that warrants considerable deference from the
23 courts.

24 And so we are looking to those authoritative
25 interpretations of federal law as a guide to what the

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1 statute means at the end of the day, not as a sort of
2 independent source of preemptive authority apart from what
3 the statute otherwise provides.

4 There's a second part of this, Your Honor, which is
5 we're not dealing just with express preemption here. We're
6 dealing with conflict preemption. As you recognized on your
7 original ruling on the motion to dismiss, there are two
8 different types of conflict preemption, right? One type of
9 conflict preemption is impossibility preemption. We're not
10 taking the position in this case that there is impossibility
11 preemption. We think, at least in theory, it is possible to
12 comply with at least some of the claims that the State might
13 pursue in this case -- more on that in a moment -- and
14 federal law --

15 THE COURT: That it's possible to actually do this
16 without misrepresenting -- engaging in unfair or deceptive
17 practices as defined by law. Correct?

18 MR. SHUMSKY: Sure. As defined by law, not
19 necessarily what the State argues unfair and deceptive
20 practices are, but yes. We think that at least for certain
21 of the things that the State is going to argue at trial or
22 may argue at trial -- again, I want to come back to that
23 concept in a moment -- impossibility preemption isn't an
24 issue.

25 There's a second type of conflict preemption called

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1 purposes and objectives preemption where what the Court has
2 to do is determine whether or not state law claims that the
3 State is pursuing or may pursue at trial are consistent with
4 the purposes and objectives of the legislation that Congress
5 has passed. The same principles that we're talking about in
6 terms of deference to the agency's authoritative
7 interpretation of 1098g apply to a federal agency's
8 interpretation of what the purposes and objectives of the
9 statutory framework are.

10 THE COURT: Can I -- and I understand the idea of
11 giving deference to things. But can I just ask you, if our
12 courts were somehow giving deference to these, for lack of a
13 better word, policy decisions made by individuals appointed
14 by the executive branch, don't we actually run a danger of
15 having these different interpretations vary possibly every
16 four years and not having some continuity and consistency as
17 to how the courts look at this? I mean, isn't that why, if
18 Congress intended to preempt this, they would have done so?

19 MR. SHUMSKY: Well, I -- trying to think about the
20 right order to do this in. But I think I've got three
21 responses to that --

22 THE COURT: I know that had a lot in it --

23 MR. SHUMSKY: -- Your Honor.

24 THE COURT: -- but --

25 MR. SHUMSKY: So let me try and unpack a few things

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1 there. I want to answer the question that you asked very
2 directly up front, which is yes, there is a risk that a
3 federal agency can change its interpretation over time. The
4 U.S. Supreme Court has recognized that for decades. What it
5 has said is, look, where the language of a statute is plain,
6 then an agency has no leeway to change its mind because what
7 Congress has explicitly provided for controls. And,
8 obviously, a federal agency is subservient to Congress and
9 it can't sort of change what it's doing.

10 But where there's ambiguity in the statute, where
11 there's room for an agency to fill a gap or to choose among
12 competing but nonetheless both reasonable interpretations of
13 what federal law is, there are a couple of values that are
14 served by deferring to an agency, even where an agency might
15 change its mind over time. One of the values that's served
16 by that is agency expertise. And I don't mean to take
17 anything away from you, Your Honor, but --

18 THE COURT: Oh, please --

19 MR. SHUMSKY: -- judges in general are generalist
20 judges. They deal with all kinds of subject matter. We
21 were late coming into court this morning because we went
22 down to your old courtroom and watched some of the docent
23 calendar. Right? Judges deal with a lot of different kinds
24 of issues. United States Department of Education deals with
25 the Higher Education Act. It's a subject matter expert.

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1 And so there's a value, the Court has said, in the
2 Chevron case in the context of dealing with questions of
3 agency deference, there's an expertise-based rationale for
4 giving some additional leeway to agencies who may well, in
5 light of changed circumstances or evolving conditions,
6 change their mind about how best to effectuate the purposes
7 or how best to resolve an ambiguity in the statute in light
8 of that specialized knowledge. That's one value that's
9 served by that.

10 The second value that's served by that is there's
11 some democratic accountability, which is at least in the
12 federal system, not in every state but in lots of states
13 too, judges have lifetime or very long appointments to the
14 bench and can't be removed where the people disagree with
15 the policy decision that a judge has made. But we vote
16 every four years for the president of the United States.
17 The president of the United States chooses the head of the
18 executive branch. If you don't like what a federal agency
19 is doing, the Supreme Court said in the Chevron case, you
20 can vote him or her out of office at the conclusion of their
21 term, get a new set of executive branch heads, and that way
22 there's a sort of democratic accountability mechanism that
23 solves the counter-majoritarian dilemma, the problem that
24 you might have a judge ossifying the law in a way that's at
25 odds with what the people have chosen through the electoral

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1 process to put in place. So big conceptual theoretical
2 answer to your question.

3 Yes, I hear you. It can change every four years.

4 The Supreme Court has said that's okay when you're dealing
5 with ambiguity in the statute. For --

6 THE COURT: But is there ambiguity in the statute?

7 I guess that's the second part of my question.

8 MR. SHUMSKY: -- those two reasons. Well, so the
9 second part of that question is, Your Honor, I actually
10 don't think that there is any ambiguity in the statute.
11 Section 1098g says that no federal loan shall be subject to
12 any disclosure requirement of any state law. It's broad.
13 It's unqualified. And it's unambiguous. It says where a
14 state is seeking to require a federal lender to make a
15 disclosure, even if that same disclosure is required by
16 federal law, the State can't enforce that law. You
17 recognize that in your original decision. You said, I
18 certainly recognize that there are claims that will be
19 preempted -- let me just read that. You said -- and in this
20 case, there is 1098g, it does expressly preempt certain
21 things.

22 And this is the point that I wanted to come back to
23 a moment ago. I know I tried to bracket it a couple of
24 times before, which is as Ben just conceded, right? The
25 same standard that was at issue on 12(b)(6) and that you

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1 rely upon in denying our motion to dismiss is the standard
2 that applies to the State's motion here. Which is if there
3 is any conceivable set of facts, any evidence that the State
4 wants to introduce, any argument that the State wants to
5 make, any claim that the State wants to pursue that would
6 run afoul of that broad and unqualified language in 1098g,
7 you have to deny their motion to effectively strike our
8 affirmative defense, which would have the consequence of
9 preventing us from mounting those objections down the road.

10 And it simply cannot be said that there is no
11 conceivable claim or argument or evidentiary avenue that the
12 State wants to pursue in this case that would run or avoid
13 running into that explicit and unambiguous prohibition of
14 1098g. But the reason why the deference question comes up,
15 it's sort of a, well, but even, right? Even if there were
16 some ambiguity, we have a series of decisions where the
17 Department of Education consistently has taken a broad view
18 of 1098g, going, as I said before, all the way back to the
19 Clinton administration.

20 I would point out the 9th Circuit has deferred to
21 the Department of Education's preemptive interpretation or
22 interpretation of the preemptive scope of 1098g twice. The
23 7th circuit has done it. I would add, we pointed out, the
24 Great Lakes case from the Northern District of Illinois in
25 our briefing that granted a motion to dismiss similar to the

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1 one that we brought in this case, obviously under a federal
2 standard rather than the any-conceivable-set-of-facts
3 standard that you applied.

4 I should tell you, two days ago, the middle district
5 of Florida -- sorry, the Northern District of Florida,
6 federal court, issued another decision, again deferring to
7 the Department of Education's position finding that 1098g
8 expressly preempted claims against a loan servicer there,
9 Great Lakes, one of Navient's competitors. So you have a
10 growing body of case law, body of case law that's consistent
11 back to the 1990s. This is even if there were any ambiguity
12 in the broad scope of Section 1098g, I'm going to defer to
13 what the Department of Education has said on this matter.

14 So, you know, at bottom I think what we're asking
15 you to do, Your Honor, is recognize under the standard that
16 the State has conceded that you're bound to apply, there are
17 things that the State may argue at trial down the road that
18 would run afoul of the prohibition that's expressly
19 unambiguously set forth in 1098g, that even if there was
20 some ambiguity in that, we have authoritative
21 interpretations that date back across multiple
22 administrations, Democratic and Republican, that impose or
23 adopt the same broad unqualified interpretation of 1098g.
24 That it certainly can't be said there was nothing that the
25 State was going to argue in this case that would run afoul

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1 of that. And allow Navient, if and when we get to trial, to
2 raise our objections. To say this line of questioning is
3 off limits, this is inappropriate.

4 Very last thing that I want to say about that is --
5 and Mr. Roesch said before -- they were planning to raise
6 these issues on summary judgment. That's the appropriate
7 time if you're going to wade into this, to wade in --

8 THE COURT: Well, the issue of preemption isn't
9 going to be decided by a jury. It's going to be decided by
10 this Court.

11 MR. SHUMSKY: Oh, certainly not. But it ought to be
12 decided claim by claim when the State raises certain
13 arguments. Right?

14 I'll give you just one example, right? We pointed
15 out in our opening brief -- again, irrespective of this
16 no-conceivable-set-of-facts standard, we have 1098g, which
17 expressly bars any state disclosure requirement. There are
18 claims that are in the complaint that explicitly fault
19 Navient for failing to make certain disclosures. And they
20 actually use the words, "failed to disclose." We said that
21 is clearly preempted. That should be taken out of the case.
22 And you said it's premature to do that, right? The standard
23 is, is there anything the State could argue down the road,
24 claim an evidentiary avenue they could pursue that wouldn't
25 be subject to that objection? If there is, I have to deny

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1 the motion to dismiss. But when the time comes, right?

2 If the State starts to argue about nondisclosure or
3 failure to disclose, we want to have the ability to say to
4 the Court, Your Honor, that is preempted. We're no longer
5 in hypothetical land where is there some conceivable set of
6 facts. We're confronted with an actual situation in which
7 the State is trying to fault Navient for not making a
8 disclosure. If so, that's the time, at that point in the
9 case, to resolve those objections. And that's what we want
10 to preserve the ability to do, Your Honor.

11 THE COURT: Thank you.

12 MR. SHUMSKY: Thank you.

13 THE COURT: Which -- and, again, I think that it
14 would be, in all fairness, easier to start where we left
15 off. This brings me back to that question, you know that
16 the 12(b)(6) or the 12(c) standard, I think both parties
17 know, this is a pretty high standard. This is any set of
18 conceivable facts beyond a reasonable doubt. I mean, it's a
19 pretty high burden, especially when we have statutes that
20 say, yeah, there's certain circumstances under which this
21 can be preempted, and we have other state -- I mean,
22 wouldn't my recognition that other states have engaged in
23 this inquiry automatically say there's reasonable doubt and
24 you don't meet that 12(c) standard?

25 MR. ROESCH: Your Honor, I don't think so. And

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1 let's unpack a couple things.

2 First of all, the State's motion doesn't seek to
3 strike -- seek to dismiss the 1098g express preemption
4 argument in its entirety. That relates to a specific claim
5 and specific paragraphs in the complaint.

6 I would refer the Court to paragraph 5.138 where the
7 State has alleged Navient made affirmative
8 misrepresentations on its website to borrowers. Those
9 representations weren't about the loans themselves. They're
10 not about the loan's terms, conditions, interest rates,
11 anything like that. These were representations about what
12 Navient was going to do for those borrowers if the borrowers
13 took the action of calling in. The Court in the CFPD case
14 held that this created an affirmative duty on Navient to act
15 in accordance with those promises. Navient's failure to do
16 that, Your Honor, its actions in making representations
17 about what its own actions would be and then breaching those
18 representations, can't be characterized in any way as a
19 failure to make disclosures about the loan.

20 The other point regarding the standard relates to
21 the notion of obstacle preemption. In order for that
22 defense to survive, we need a couple things. First, we have
23 to establish a purpose of Congress -- and it's key. We'll
24 get back to the sort of level of deference and how to deal
25 with the Department of Education's pronouncements about

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1 this. But we're looking for a purpose of Congress that
2 could even conceivably be thwarted by a prohibition on
3 making misrepresentations to student loan borrowers. I
4 would submit, Your Honor, there is none, because we simply
5 haven't established that threshold legal issue of what is
6 the purpose.

7 We talked about the HEA's purpose broadly. We
8 talked about uniformity. We can talk, if Your Honor would
9 like, about the Department of Education's invocation of the
10 federal fisc. Again, Congress has spoken about how it wants
11 to manage these loans. In 20 USC 1082a(1) it specifically
12 says damages will not be passed on to the United States for
13 the actions of student loan services. So that is, Your
14 Honor, how Congress intended to protect the federal fisc.
15 It also intended to protect the federal fisc by switching
16 from the FELL program to the direct lending program and
17 cutting out the private lender middleman.

18 There's no indication, much less the type of
19 compelling evidence that's required from the 9th Circuit And
20 Supreme Court case law governing preemption that Congress
21 intended to save money by getting rid of traditional state
22 Consumer Protection Acts that impose the same type of
23 prohibitions that are generally applicable under federal
24 law. In fact, that would be a really strange way to save
25 money, because Navient still has to comply with these same

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1 standards, regardless of the application of state law.

2 Finally, Your Honor, in terms of the deference to be
3 accorded to an agency's pronouncements regarding Congress's
4 purposes and Congress's objectives in the statute that it
5 administers, *Wyeth v Levine* speaks directly to that. It's
6 not Chevron deference. It's not our deference. It's what's
7 called Skidmore deference. Specifically, the Supreme Court
8 says we have not deferred to an agency's conclusion that
9 state law is preempted. It recognizes that departments like
10 the Department of Education may have some insight into how
11 state law interacts with the federal scheme.

12 Here's the key passage: The weight we accord the
13 agency's explanation of state law's impact on the federal
14 scheme depends on its thoroughness, consistency, and
15 persuasiveness.

16 Your Honor, for the reasons we explained in the
17 brief and have talked about here, that interpretation is not
18 entitled to any weight. It is conclusory, and it entirely
19 ignores any case law that it finds inconvenient.

20 Unless you have any questions, that's it for me.

21 THE COURT: No. Thank you.

22 MR. ROESCH: Thank you.

23 THE COURT: So then we turn to the 12(c) motions
24 proffered by the defendant. And in this instance, there's a
25 few things that are at issue. Number one, the statute of

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1 limitations that you claim is at issue. Number two, whether
2 or not injunctive relief is appropriate and whether or not
3 restitution can be applied when there is no injunction and
4 how that impacts this case. I think I have outlined those
5 three things that you're seeking to have this Court address.

6 So let's start with the statute of limitations.

7 MR. SHUMSKY: Sure. Absolutely, Your Honor. And,
8 you know, that's exactly the order that I want to tackle
9 these issues in.

10 I think the statute of limitations argument is as
11 straightforward an argument as you'll ever see. Let me
12 start by just saying as a matter of fact, there is no
13 dispute between the parties that the conduct that's
14 challenged in Count 1 of the complaint ceased no later than
15 2009. It's also undisputed that the State brought this
16 action more than two years after it alleged that the
17 challenged conduct ceased.

18 So the only question in front of the Court from the
19 statute of limitations perspective is, can the State seek
20 the recovery of a civil penalty, despite failing to comply
21 or bring its suit within two years? And the plain language
22 of the statute addresses that. RCW 4.16.100(2) gives a two-
23 year statute of limitation in any action upon a statute for
24 a forfeiture or penalty to the State. And there is no
25 question that Count 1 is an action upon a statute for a

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1 forfeiture or penalty to the State. It's a claim brought
2 under the CPA, which provides in RCW 19.86.140 that every
3 person who violates RCW 19.86.020 shall forfeit and a civil
4 penalty to the State.

5 In other words, whereas the statute of limitations
6 applies to any action upon a statute for a forfeiture or a
7 civil penalty to the State, the statute that the State is
8 actually proceeding under provides for a forfeiture and a
9 civil penalty to the State.

10 Second, you can actually look at the claim for
11 relief in the complaint. It's actually Paragraph 9.4, where
12 the State is seeking an award of a civil penalty in the
13 amount of \$2,000, pursuant to 19.86.140. So we have a
14 situation where the statute of limitations by its express
15 terms mirrors exactly what the substantive relief the State
16 is seeking is, and therefore, it's subject to the two-year
17 statute of limitations.

18 THE COURT: But doesn't the State also except itself
19 in another statute?

20 MR. SHUMSKY: Right. So there is another statute
21 that generally says the State is not subject to statute of
22 limitations claims. Right? And, fortunately, the
23 Washington Supreme Court has addressed this precise set of
24 arguments twice. In LG Electronics, the Supreme Court of
25 Washington looked at these provisions and said that general

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1 rule, which is in RCW 4.16.160, generally bars statute of
2 limitations in actions brought by the State unless there is
3 an express provision to the contrary. That's at 186 Wn.2d.
4 The pin cite is 13. And they actually reiterate that at the
5 very conclusion of their opinion. The pin cite here is 186
6 Wn.2d at 18. In the absence of an express statute to the
7 contrary, the State's action is barred by the two-year
8 statute of limitations. We have an express statute to the
9 contrary. It's the one that deals with precisely the kind
10 of claim that the State is pursuing in this case. That's
11 4.16.100(2).

12 There's another case where the Supreme Court of
13 Washington addressed this. It actually predates the LG
14 Electronics case. It's the U.S. Oil case. I'd like to point
15 you to 96 Wn.2d at pages 88 to 90. The Court in that case
16 specifically looked at the conflict between these two
17 statute of limitation provisions, the one that we say
18 applies here, which specifically deals with civil penalties
19 to the State, and then the general one that has the nullum
20 tempus doctrine embedded within it. And it said we're going
21 to draw what we call a remedial penal distinction, that in
22 cases where the State is seeking remedial relief, which U.S.
23 Oil made clear means monetary damages, but not where it's
24 seeking penal relief, i.e. civil penalties, that doctrine
25 applies. But in cases where the State is seeking civil

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1 penalties, the express prohibition in 4.16.100(2) applies.

2 And I will say this, I had to read that case a lot
3 of times, because it just talks about the remedial penal
4 distinction without really explaining what it is. But what
5 it says in that opinion, the Supreme Court said we adopt the
6 distinction that was drawn by the Court of Appeals when the
7 Court of Appeals in its decision articulated the remedial
8 penal distinction. And if you go back and you look at the
9 Court of Appeals opinion where they adopted this remedial
10 penal distinction, this is what the Court of Appeals said
11 that the Supreme Court of Washington in its decision later
12 adopted by express reference. This will be at 27 Wn.App at
13 107: Ever since 1854, the legislature has distinguished
14 between an action which imposes a forfeiture or a penalty
15 and any other type of action. This distinction is described
16 as penal versus remedial.

17 This is a case that involves an action for a
18 forfeiture or a penalty, right? Again, that's the explicit
19 language set forth in the CPA. The reference in the U.S.
20 Oil case is to the statute of limitations provision that
21 we're talking about, 4.16.100(2). It's not a monetary
22 damages action. It's not anything else.

23 And it is remarkable for the State to be taking a
24 position that an explicit prohibition, a statute of
25 limitations that by definition runs against the State,

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1 because again, it applies only to a penalty or a forfeiture,
2 so the State somehow isn't subject to that statute of
3 limitations. It would write that provision of the RCW out
4 of the Washington state code. So that's our argument on the
5 statute of limitations.

6 But you said there's two other issues. There are
7 two other issues: Injunctive relief and restitution. What
8 I would just like to say very quickly before I transition to
9 those issues is those issues are conceptually distinct from
10 the penalty issue. Those are not statute of limitations
11 arguments. They are not subject to your analysis on the
12 statute of limitations. They are different kinds of claims.
13 They're two different issues that are presented there.

14 The first is the question of whether or not it is
15 appropriate for the State to be seeking injunctive relief
16 here. And as the Ralph Williams case said, that's the
17 leading case from the Washington Supreme Court on this,
18 injunctive relief is proper only where there's, quote,
19 unquote, a cognizable danger of recurrent violation. That's
20 87 Wn.2d at 312 to 313. And the State has not put forward
21 any evidence that there is a cognizable prospect or danger
22 of a recurrent violation in this case.

23 As the complaint itself concedes, and, again, we're
24 moving here for judgment on the pleadings, but as the
25 complaint itself concedes, the conduct that they're

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1 targeting in this case ended in 2009. There is no
2 allegation that Navient has engaged in this conduct since
3 the end of 2009. I mean, I was pretty shocked when I read
4 their reply brief, because the best -- or, sorry, their
5 opposition brief, because the best they can say -- have a
6 bunch of sentences that begin hypothetically, somebody who
7 worked at Sallie Mae is still employed at Navient.

8 Hypothetically Navient might one day begin originating
9 loans. But there's no allegation that Navient is actually
10 in the process of doing any of the things that are
11 prohibited. No realistic possibility that Navient is going
12 to engage in the particular conduct that the State is
13 concerned about.

14 As they say in their complaint, and they plead it
15 repeatedly, the preferred lending era ended in 2007. The
16 use of subprime lending as a loss leader to attract more
17 businesses from colleges ended in 2009. Those things don't
18 happen anymore. Schools don't have preferred lender lists.
19 And Navient has no plans now or in the future to engage in
20 the kind of conduct that the State alleges is actionable
21 here.

22 And in the absence of any possibility or prospect,
23 realistic chance or danger that Navient is going to do these
24 things --

25 THE COURT: Let's address that issue, realistic

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1 chance. So certainly you're not engaging in the conduct
2 right now because of a certain agreement that was entered
3 into, correct?

4 MR. SHUMSKY: Correct.

5 MR. ROESCH: So that agreement or the conditions of
6 that agreement are no longer in effect as of 2019, which is,
7 what, 60 days away essentially? 90 days away? Correct? So
8 as we talk about realistic, isn't there a realistic chance
9 in the -- under our 12(c) -- I'm not -- mind you, I'm under
10 a 12(c) standard. I'm not under a summary judgment
11 standard. So I'm not looking at just the facts of this
12 case. I'm looking at hypothetically speaking, which is
13 what --

14 MR. SHUMSKY: Your Honor, I actually disagree with
15 that, which is the standard here of whether or not an
16 injunction is appropriate. That's independent of the 12(c)
17 standard.

18 THE COURT: I understand.

19 MR. SHUMSKY: And the test for entry of an
20 injunction is there actually has to be a danger that this is
21 going to happen again. And the State has pointed to nothing
22 beyond the fact that some people who worked at Sallie Mae
23 pre 2009 work at Navient today. They have given no
24 indication, no evidence, nothing that's come out in
25 discovery, nothing in our documents, nothing in any public

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1 statements that Navient has made that, boy, you know what?
2 Starting in 2019, we're going to start trying to resuscitate
3 preferred lender arrangements.

4 THE COURT: Here's where it gets a little murky.
5 So, obviously, under an injunction standard, it's a pretty
6 high standard in and of itself. You have to essentially
7 show a likelihood, number one, of winning on the merits of
8 the case, most of all. But then we have that injunction
9 standard put within the context of a 12(c) motion. You
10 understand? So those analyses are, while they're
11 intertwined, they're a little bit independent of each other
12 as well. Because I don't have an injunction before me.
13 Right? At this point.

14 MR. SHUMSKY: Well, they do have a claim seeking an
15 injunction in this case.

16 THE COURT: But --

17 MR. SHUMSKY: What they don't have and what they
18 have not introduced at any point, whether it's in the
19 complaint or otherwise -- and, again, if we're doing this on
20 12(c) you're supposed to look at the allegations that are in
21 the complaint. Your Honor, you can read the complaint from
22 top to bottom. There's not a single sentence in a single
23 paragraph of the complaint that alleges, that in any way
24 remotely alleges that it is likely, that it is probable that
25 Navient's going to engage in this conduct in the future. So

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1 we have a situation where the complaint doesn't have any
2 allegations that support the entry of the injunction.

3 We're now months -- a year into the discovery
4 process since our motion to dismiss was denied. The State
5 has identified no evidence after a year of discovery that
6 would support the proposition that Navient is likely, that
7 there's a reasonable possibility, that this is going to
8 happen in the future. We put the State to that challenge in
9 our opening brief. They came back in their response. And
10 the best they could come up with is hypothetically, Jack
11 Remandi, who was at Sallie Mae, is the CEO of Navient.

12 THE COURT: And I think that --

13 MR. SHUMSKY: And, Your Honor, that can't plausibly,
14 reasonably support the entry of an injunction --

15 THE COURT: And I think that number three --

16 MR. SHUMSKY: -- in this case -- sorry.

17 THE COURT: -- folds into your number two argument.
18 I want to give you time for rebuttal. So I understand that
19 the restitution argument folds into the injunctive relief
20 argument.

21 MR. SHUMSKY: Sure. And --

22 THE COURT: So I'm going to -- anything you want to
23 say before I turn it over?

24 MR. SHUMSKY: Yeah. Let me just say one thing about
25 that very quickly.

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1 THE COURT: Okay.

2 MR. SHUMSKY: Which is the State's position on the
3 restitution question is highly misleading, and I was quite
4 surprised when I saw it. The quote that they give you in
5 their brief at Page 15 is that RCW 19.86.080(2) -- this is a
6 full quote of their quotation -- grants the Court
7 wide-ranging equitable authority to issue -- now they have a
8 quote in this quotation -- orders for judgments as may be
9 necessary. Close their quote. To provide restitution.

10 That is not what the statute says. What the statute
11 actually says is that the Court may, quote, make such
12 additional orders or judgments as may be necessary. The key
13 word there, Your Honor, is such additional orders or
14 judgments as may be necessary. What are those judgments or
15 orders in addition to? Right? That's parenthese 2, so
16 Section 2 of the statute, it's the relief that's set forth
17 in Subsection 1, it's injunctive relief --

18 THE COURT: Injunctive relief.

19 MR. SHUMSKY: -- and as Ralph Williams said, in the
20 absence of an injunction, there is no free-standing cause of
21 action. So this is an issue that's been up to the
22 Washington Supreme Court. It has been squarely addressed
23 and foreclosed by the Washington Supreme Court by 40 years.
24 And the state's selective quotation of the law and refusal
25 to engage with the holding of Ralph Williams can't solve

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1 that claim.

2 So you're right. It's pegged back to whether
3 there's a proper case for an injunction, which as we've
4 said, there isn't. Thank you.

5 THE COURT: Yes. Thank you. That's what I wanted
6 to make sure that I -- it folds into the other one.

7 MR. SHUMSKY: Yes, Your Honor.

8 THE COURT: So I'm going to give the State -- good
9 morning.

10 MS. SMITH: Good morning, Your Honor.

11 THE COURT: So I'm going to have a couple of
12 questions as well.

13 MS. SMITH: All right.

14 THE COURT: How can I grant prospective injunctive
15 relief on something that doesn't currently exist?

16 MS. SMITH: Well, Your Honor, in our complaint we
17 didn't allege that all of the conduct stopped in 2007. Some
18 of it did continue beyond that. We allege that it continued
19 well into 2009. And we have also addressed in our brief
20 hypothetical facts that show why an injunction is necessary
21 and proper in this case.

22 THE COURT: Well, let me back that up a little bit.
23 Because even looking at those hypothetical facts,
24 technically somebody could come into court and allege a set
25 of things that might happen in the future, but don't they

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1 have to have some basis in the present for this Court to
2 take action?

3 MS. SMITH: Your Honor, no. They don't have to have
4 a basis in the present. But what we have are allegations of
5 conduct in the past and --

6 THE COURT: Eleven years ago, correct?

7 MS. SMITH: Yes, Your Honor. And a real possibility
8 that Navient is poised to engage in that conduct in the
9 future. It has said that it is poised to reenter the loan
10 origination market when its noncompete agreement with Sallie
11 Mae expires.

12 THE COURT: Well, and let me ask that. But don't I
13 have to presume, essentially, and I know this isn't a penal
14 thing, but it would be essentially like saying, well, you're
15 poised to be released from jail, so maybe I should just go
16 ahead and have you arrested now so we can avoid any
17 potential crimes in the future?

18 MS. SMITH: Well, that is sort of like probation,
19 Your Honor. You're getting out of jail. I'm going to
20 release you, but I need to put conditions on it because it
21 is certainly possible that you could engage in this conduct
22 in the future.

23 And that's what an injunction is. It doesn't stop
24 Navient from engaging in loan origination. It would stop
25 Navient from engaging in the kinds of unfair deceptive acts

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1 and practices that we have alleged that Navient has engaged
2 in in the past and could very well, when it is released from
3 its noncompete agreement, engage in in the future.

4 So what an injunction will do is it will stop unfair
5 deceptive acts or practices that could possibly occur.

6 THE COURT: But -- maybe I -- doesn't the law, as
7 this Court has so far ruled in any prior motion, say that
8 the CPA, the state CPA applies to Navient? That they can't
9 essentially run away from their obligations, duties, and
10 responsibilities under the state Consumer Protection Act?
11 Doesn't the law itself act as a bar from them engaging in
12 those practices?

13 MS. SMITH: It does, Your Honor, but a lower bar. A
14 higher bar from -- an organization that we have alleged in
15 the past engaged in significant unfair and deceptive loan
16 origination practices should be held to a set of -- should
17 be held to an injunction that can be enforced much more
18 quickly for the benefit of the public than the State can
19 investigate and file a lawsuit, a brand new lawsuit, under
20 the Consumer Protection Act to once again prove that Navient
21 engaged in conduct that we had alleged in this complaint,
22 Your Honor. That's why an injunction is so important. It
23 acts as sidebars on a company that we know has -- or we have
24 alleged has engaged in these practices that, okay, you can't
25 do these things anymore. These things violate the Consumer

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1 Protection Act. You are enjoined from doing that. Navient
2 would not be enjoined from originating loans so long as
3 those origination practices were not unfair or deceptive.

4 And, Your Honor, you have the authority, you have
5 the equitable power to place that injunction on Navient,
6 should the State prove that it engaged in this conduct.

7 THE COURT: So -- and as we look at the Ralph
8 Williams case, the big difference between the two that I'm
9 seeing is that when this complaint was filed, those
10 practices were not being engaged in at the time the
11 complaint was filed. In the Ralph Williams case, for
12 example, the suit was filed, and then the practices were
13 changed in, essentially, response to the lawsuit. Does that
14 change the burden that this Court has to look at in terms of
15 finding a cognizable danger of recurrent violation?

16 MS. SMITH: No, it doesn't, Your Honor. It doesn't
17 change the standard for mootness at all. It's the same.
18 What it does change is that if Navient had changed its
19 practices, had voluntarily stopped its practices after we
20 filed the lawsuit, its burden would be a little bit heavier
21 to show that there was -- that there is no cognizable
22 danger, but it wouldn't be eliminated.

23 Really, that's the touchstone. Whether they stopped
24 before we filed the lawsuit or they stopped after we filed
25 the lawsuit, the touchstone is the same for mootness. It

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1 doesn't matter.

2 It's also important to note that the state of New
3 York had entered into an assurance of discontinuance with
4 Navient in 2007 before we filed this lawsuit that addressed
5 some of the practices that we allege in our lawsuit. So
6 there was a response in Navient's behavior to a state
7 enforcement action, the state of New York. And I would also
8 note to the Court that we allege that some of those
9 practices that Navient engaged in actually continued beyond
10 even the New York assurance of discontinuance. So that even
11 -- that increases the necessity for an injunction in this
12 case, that there needs to be more with a company like this
13 to stop it from engaging in unfair practices.

14 THE COURT: And I know that we went backwards.

15 MS. SMITH: Yes.

16 THE COURT: And because the restitution issue is --
17 I think everybody agrees married to the injunction issue, I
18 think that those arguments kind of fold into each other.

19 But let's address the statute of limitations. And
20 let's address the express versus general issues of statutory
21 interpretation.

22 MS. SMITH: Yes, Your Honor, let's talk about that.
23 That's very important, and it's key in this case.

24 The LG Electrics decision, the state Supreme Court
25 decided in LG Electrics and -- Electronics, and counsel read

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1 part of the ruling. I'll read the rest, Your Honor. It
2 says, we hold that when the attorney general enforces
3 antitrust laws under RCW 1986 080, the exact same statute
4 that we are proceeding under in this lawsuit, he or she acts
5 in the name of or for the benefit of the State within the
6 meaning of RCW 416 160. In the absence of an express
7 statute to the contrary, the State's action for injunctive
8 relief and restitution pursuant to 080 is exempt from the
9 statute of limitations in RCW 1986 120 that doesn't apply
10 here.

11 And this is the important part. And from the
12 general statutes of limitations in chapter 416 RCW. Because
13 in the LG Electronics case, the defendants had argued that
14 other general statutes of limitation set forth in RCW 416
15 put limitations -- put a statute of limitations on the
16 State's ability to file that lawsuit. Those were general
17 statutes of limitations, and the Court held that they didn't
18 apply. Because this statute was brought for the benefit in
19 the name of the State, they didn't apply.

20 RCW 416 100 subsection 2, the penalty statute of
21 limitations that Navient is arguing, is also a general
22 statute of limitations set forth in RCW 19 -- RCW 416. The
23 analysis that the Supreme Court engaged in in the LG
24 Electronics case is equally applicable to that general
25 statute of limitation as well. And the Consumer Protection

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1 Act does not include an express statute of limitation on
2 attorney general actions to enforce 080. It contains a
3 separate statute of limitations on private parties when they
4 seek to enforce -- when they bring their actions under 090.
5 There is no express statute of limitations for -- that
6 applies to the attorney general's actions under 090.

7 And it also goes back -- and it ties in very nicely
8 with the Supreme Court's decision in U.S. Oil that counsel
9 also mentioned. Because in that case, the Court was
10 actually faced with 416 160 that said there is no statute of
11 limitation against the State when it brings a case in the
12 name or for the benefit of the State. And this other
13 statute of limitation with respect to penalty. And what the
14 Court looked at, it said, well, in order to give both of
15 these statutes meaning, we're going to decide that the 160
16 statute applies when statutes are remedial and the 19 -- or
17 the 416 100 Subsection 2 statute of limitations on penalties
18 applies when the statute is penal or criminal.

19 The Consumer Protection Act is a remedial statute.
20 All of the equitable remedies in the CPA are designed to
21 protect the public. They're not intended to punish
22 everybody and anybody. And those remedies work in tandem,
23 sort of the first remedy, you know, for civil penalties,
24 they operate first because they act to prevent violations of
25 the CPA in the first place. Injunctions stop or prohibit

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1 the continuation of conduct that violates the CPA. And
2 restitution reestablishes the status quo. They all work
3 together.

4 And another very important point to make is that in
5 the Ralph Williams case, 82 Wn.2d 265, the Court held that
6 the attorney general could sue for penalties alone under the
7 Consumer Protection Act and asked for no other remedy, and
8 this would further the CPA's beneficial purpose to protect
9 the public and foster fair and honest competition. The
10 Federal Trade Commission, the federal court decisions
11 interpreting the Federal Trade Commission action, which is
12 the federal analog to the Consumer Protection Act, the
13 federal courts repeatedly held that the FTC act is remedial
14 and not penal. The purpose -- and those statutes provide
15 for penalties. The purpose is to protect the public, not to
16 punish. Many states have also held that their Consumer
17 Protection Acts that also provide for civil penalties are
18 remedial and not penal in nature --

19 THE COURT: Punitive.

20 MS. SMITH: Punitive. Yes.

21 THE COURT: Anything else that you wish to add with
22 regards to these issues?

23 MS. SMITH: Well, Your Honor, the argument that
24 Navient makes that this Court is precluded by a statute of
25 limitations from imposing civil penalties, that this Court

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1 is precluded from issuing an injunction, and this Court
2 can't order restitution are arguments that limit this
3 Court's equitable power. The Court's equitable power needs
4 to be very broad and flexible in cases like this when
5 dealing with remedial statutes. It shouldn't be -- it
6 shouldn't be narrow and confined.

7 And that is the -- that is really what's at bottom
8 with Navient's argument, is an attempt to restrict the
9 Court's equitable powers to deal with the kind of unfair and
10 deceptive practices that we alleged in Count 1 of our
11 complaint.

12 THE COURT: All right. Thank you. Rebuttal? Five
13 minutes.

14 MR. SHUMSKY: Thanks, Your Honor. I'm going to try
15 and do this in a lot less than five minutes.

16 With respect to the State's characterization of LG
17 Electronics as rejecting the argument that I made a little
18 while ago is expressly rejected by LG Electronics itself.
19 To the extent that the State has just taken the position
20 that LG Electronics forecloses the application of the
21 explicit statute of limitations on which our motion depends,
22 Footnote 4 says we stress that our opinion is limited to the
23 attorney general's 080 claims, insert some ellipses, for
24 damages on behalf of state agencies and restitution for
25 state consumers. It specifically said we are not addressing

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1 the attorney general's claims for civil penalties under the
2 provision that's at issue here because that wasn't properly
3 presented to the Court within the question recognized that
4 there, in contrast to the provisions that were in front of
5 the Court, there is an express statute of limitations.

6 And to go back, the Court in U.S. Oil actually dealt
7 with this very issue. And I think I did a particularly
8 lousy job a few minutes ago of explaining the penal remedial
9 distinction in U.S. Oil. But let me try that one more time,
10 because I think it's directly relevant to what the State has
11 just argued.

12 The question in determining under U.S. Oil whether
13 or not we're talking about something -- I'm going to talk
14 about what that something is -- is penal or remedial turns
15 not on sort of platitudes and generalities about what the
16 purpose of a statute is, whether or not the purpose is to
17 remediate or the purpose of the statute is to punish. It
18 turns on the nature of the relief, of the particular relief
19 that's being sought.

20 And the quotation that I read you before from the
21 Washington Court of Appeals opinion in the U.S. Oil case,
22 that the Supreme Court of Washington relied upon, makes that
23 entirely clear. That what matters is whether or not the
24 relief being sought is penal or remedial. I don't take any
25 issue with the State's claim that restitution is a remedial

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1 form of relief, that injunctive relief, if it's appropriate.
2 I don't know that we need to talk about that anymore -- has
3 a remedial purpose to it. But we're not talking about that
4 in the context of the statute of limitations argument.

5 As I said before, this is separate. The statute of
6 limitations issue is specific to the civil penalties. And
7 civil penalties are just that. They're penal. They're not
8 remedial in nature. And saying that as a general matter of
9 the Washington -- the Bureau pursuing a CPA claim means that
10 what it's doing is remedial sort of is blind to the reality
11 of what it's actually seeking in this case. What U.S. Oil
12 recognized a penalty is, and what LG Electronics both
13 explicitly reserved on the one hand in Footnote 4 and on the
14 other hand in its actual holdings, its interpretation of how
15 you reconcile these provisions, says essentially the
16 specific governs over the general. And that's how to
17 resolve these issues in our view.

18 And I appreciate your indulgence while I try to
19 redeem my otherwise flawed attempt to walk through that.

20 THE COURT: No. It was fine. Thank you.

21 So as I indicated on the 12(c) issues, I'm going to
22 issue an opinion in writing, because I imagine no matter
23 what opinion I issue, I want to make sure that this record
24 is a little bit more clear than mud and that the subsequent
25 courts understand this Court's reasoning. I am gone next

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1 week, so it will not be in the very near future. But look
2 for it at least two weeks after that, so certainly by the
3 middle of the next month. Just kind of wanted to give you a
4 time line. Okay? Anything else?

5 MR. ROESCH: Your Honor, just very briefly, we have
6 a proposed order on the motion to compel.

7 THE COURT: Please pass that forward.

8 MR. ROESCH: It's the same one that we submitted
9 before. It just includes reference to the opposition --

10 THE COURT: And just so the parties understand,
11 within the context of the orders, the opinion that I write,
12 I will also include what adjudicative facts this Court is
13 taking notice of. Okay?

14 MR. SHUMSKY: And then, Your Honor, if I could, one
15 thing about this order -- just on quick look, reserving my
16 parties' right to address this, there's a blank for the
17 number of days within which this information needs to be
18 produced. I don't know, as a practical matter, how quickly
19 Navient can produce this information, but more important,
20 this is something that is incredibly important to Navient.

21 And our intention at this point, although I can't
22 tell you we've made a decision about that, is at least we're
23 going to be considering seeking interlocutory review of that
24 order in front of the Court of Appeals --

25 THE COURT: So why don't I make it 30 days.

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1 MR. SHUMSKY: If you can make it 30 days, that will
2 give us an opportunity to do what we need to do to seek
3 appellate review if that's the decision that my client
4 makes, but I'd be remiss not to ask for a little bit of time
5 there.

6 THE COURT: Completely understood. Any objection to
7 days?

8 MR. ROESCH: I don't object to 30 days, Your Honor.

9 THE COURT: All right. So 30 days. Today is the
10 21st. Okay.

11 MR. SHUMSKY: Thank you so much, Your Honor.

12 THE COURT: If at some point you realize that it may
13 take longer than 30 days, please just let the Court know and
14 we can amend that if necessary.

15 Thank you all.

16 (Recording ends 11:25 a.m.)

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1

2 C E R T I F I C A T E

3

4 STATE OF WASHINGTON)

5 COUNTY OF KING)

6

7 I, the undersigned, under my commission as a
8 Notary Public in and for the State of Washington, do hereby
9 certify that the foregoing audiotape, videotape, and/or
10 hearing was transcribed under my direction as a
11 transcriptionist; and that the transcript is true and
12 accurate to the best of my knowledge and ability; and that I
13 am not a relative or employee or any attorney or counsel
14 employed by the parties hereto, nor financially interested
15 in its outcome.

16 IN WITNESS WHEREOF, I have hereunto set my hand
17 and seal this 27th day of September, 2018.

18

19

20 /s/Grace Hitchman

21 Grace Hitchman, AAERT, CET-663
22 In and for the State of Washington,
residing at Seattle.
23 Commission expires April 27, 2020

24

25

Exhibit B

The Honorable Veronica Alicea-Galván
Noted for Consideration: September 21, 2018
With Oral Argument

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

NAVIENT CORPORATION;
NAVIENT SOLUTIONS, INC.;
PIONEER CREDIT RECOVERY, INC.;
and GENERAL REVENUE
CORPORATION,

Defendants.

NO. 17-2-01115-1 SEA

(PROPOSED) ORDER GRANTING
STATE OF WASHINGTON'S MOTION
FOR AN ORDER COMPELLING
PRODUCTION OF DOCUMENTS

(Clerk's Action Required)

THIS MATTER, having come before the Court on Plaintiff's Motion for an Order Compelling Production of Documents, and the Court having reviewed the foregoing Motion, responses, if any, and considered the following material:

1. Motion for an Order Compelling Production of Documents;
2. The Declaration of Benjamin J. Roesch and the exhibits thereto;
3. The Declaration of Trisha L. McArdle and the exhibits thereto;
4. Defendants' Opposition to Plaintiff's Motion for an Order Compelling Production of Documents;

5. Declaration of Angelo J. Calfo in Support of Defendants' Opposition to Plaintiff's Motion for an Order Compelling Production of Documents and the exhibits thereto;

(PROPOSED) ORDER GRANTING
STATE OF WASHINGTON'S MOTION
FOR AN ORDER COMPELLING
PRODUCTION OF DOCUMENTS - 1

ATTORNEY GENERAL OF WASHINGTON
Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7745

6. Reply in Support of State of Washington's Motion for an Order Compelling Production of Documents; and

7. The papers and pleadings on file in this case.

The Court hereby ORDERS that the Motion for an Order Compelling Production of Documents is GRANTED. Navient Solutions, LLC is directed to produce all documents responsive to Request for Production 55 and 73 within 30 days of this Order. Furthermore, in order to eliminate the need for further motions practice on this issue, the Court Holds and all discovery in this matter is made pursuant to an order of a court of competent jurisdiction.

DATED this 21 day of September, 2018.

~~HONORABLE VERONICA ALICEA-GALVÁN~~
King County Superior Court

Presented by:

ROBERT W. FERGUSON
Attorney General

/s/ Benjamin J. Roesch
BENJAMIN J. ROESCH, WSBA # 39960
CRAIG J. RADER, WSBA #50300
MINA SHAHIN, WSBA #46661
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JULIA K. DOYLE, WSBA #43993
Assistant Attorneys General
Attorneys for the State of Washington

(PROPOSED) ORDER GRANTING
STATE OF WASHINGTON'S MOTION
FOR AN ORDER COMPELLING
PRODUCTION OF DOCUMENTS - 2

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Exhibit C

Merritt, Chief Judge, filed a concurring opinion.

 KeyCite Yellow Flag - Negative Treatment
Declined to Follow by [In re JPMorgan Chase Mortg. Modification Litigation](#), D.Mass., November 27, 2012

61 F.3d 469

United States Court of Appeals,
Sixth Circuit.

In re BANKERS TRUST
COMPANY, Petitioner.

No. 95-3199.

|

Argued June 13, 1995.

|

Decided Aug. 3, 1995.

Synopsis

Bank petitioned for writ of mandamus to vacate discovery order issued by the United States District Court for the Southern District of Ohio, Carl B. Rubin, J., directing bank to produce confidential information concerning Federal Reserve examination for use against bank in pending suit alleging fraud, misrepresentation, violations of Commodities Exchange Act, and various other causes of action arising from bank's leveraged derivative transaction business. The Court of Appeals, [Bailey Brown](#), Circuit Judge, held that: (1) documents prepared by Federal Reserve and bank during bank examination were subject to discovery despite Federal Reserve's ownership of documents, in light of apparent relevance of documents and fact that bank had possession of documents; (2) Federal Reserve regulation that precluded discovery of information about bank examination exceeded authority of Federal Reserve, was inconsistent with rule governing scope of discovery, and could not be enforced; (3) qualified bank examination privilege existed but protected only deliberative material and could be overridden upon showing of good cause; and (4) bank examination privilege belonged to Federal Reserve and, thus, Federal Reserve had to be allowed opportunity to assert privilege.

Petition granted in part, order vacated in part, and case remanded with instructions.

West Headnotes (10)

[1] **Mandamus**

 Matters of discretion

Mandamus review must be confined to matters of usurpation of judicial power or clear abuse of discretion.

[5 Cases that cite this headnote](#)

[2] **Mandamus**

 Presumptions and burden of proof

Petitioner has burden of showing that its right to issuance of writ of mandamus is clear and undisputable.

[15 Cases that cite this headnote](#)

[3] **Federal Civil Procedure**

 Existence, possession, custody, control and location

Parties in possession of documents forwarded to them by federal agency have "possession, custody or control" within meaning of rule governing scope of discovery, notwithstanding fact that agency retains ownership of documents and restricts disclosure by regulation. [Fed.Rules Civ.Proc.Rule 34\(a\), 28 U.S.C.A.](#)

[189 Cases that cite this headnote](#)

[4] **Federal Civil Procedure**

 Investigations, reports and records of in general

Privileged Communications and Confidentiality

 Regulation of financial institutions; bank examination privilege

Documents prepared by Federal Reserve and bank during Federal

Reserve's examination of bank's leveraged derivative transaction business were subject to discovery in action arising from bank's derivative contracts, despite Federal Reserve's ownership of documents, in light of apparent relevance of documents, and in light of fact that bank had possession of documents. [Fed.Rules Civ.Proc.Rule 34\(a\)](#), 28 U.S.C.A.

[26 Cases that cite this headnote](#)

[5] **Administrative Law and Procedure**

↳ Force of law

Administrative Law and Procedure

↳ Enforcement

Federal regulations should be adhered to and given full force and effect of law whenever possible and, thus, federal agency's regulation should be enforced as long as it is based upon permissible construction of enabling statute.

[4 Cases that cite this headnote](#)

[6] **Finance, Banking, and Credit**

↳ Federal Reserve System

Language in Federal Reserve regulation that required party served with subpoena, order, or other judicial process continually to decline to disclose information or testimony about Federal Reserve's examination of bank exceeded congressional delegation of general or housekeeping authority to Federal Reserve, was plainly inconsistent with rule governing scope of discovery, and could not be enforced. [5 U.S.C.A. § 301](#); Federal Reserve Act, § 11(i), [12 U.S.C.A. § 248\(i\)](#); Bank Holding Company Act of 1956, § 5(b), [12 U.S.C.A. § 1844\(b\)](#); [Fed.Rules Civ.Proc.Rule 34\(a\)](#), 28 U.S.C.A.; [12 C.F.R. § 261.14](#).

[21 Cases that cite this headnote](#)

- [7] **Finance, Banking, and Credit**
↳ Investigations and examinations
Privileged Communications and Confidentiality
↳ Regulation of financial institutions;bank examination privilege

Bank examination privilege exists but is only qualified, rather than absolute, privilege which accords agency opinions and recommendations, and banks' responses thereto, protection from disclosure in order to preserve candor in communications between bankers and examiners and thereby promote effective functioning of agency.

[18 Cases that cite this headnote](#)

- [8] **Finance, Banking, and Credit**
↳ Investigations and examinations
Privileged Communications and Confidentiality
↳ Regulation of financial institutions;bank examination privilege

Purely factual material falls outside qualified bank examination privilege and must be produced if relevant, and privilege's protection of deliberative material also may be overridden if good cause is shown.

[24 Cases that cite this headnote](#)

- [9] **Finance, Banking, and Credit**
↳ Investigations and examinations
Privileged Communications and Confidentiality
↳ Regulation of financial institutions;bank examination privilege

In determining whether bank examination privilege precludes disclosure, court must balance competing interests of party seeking

bank examination documents and those of government and, at minimum, must consider relevance of evidence sought to be protected, availability of other evidence, seriousness of litigation and issues involved, role of government in litigation, and possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

[23 Cases that cite this headnote](#)

[10] **Finance, Banking, and Credit**

↳ **Federal Reserve System**

Bank examination privilege belonged to Federal Reserve and, thus, if claim of privilege was appropriate, Federal Reserve had to be allowed opportunity to assert privilege and opportunity to defend its assertion.

[12 Cases that cite this headnote](#)

Attorneys and Law Firms

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Before: **MERRITT**, Chief Judge; **BROWN** and **MARTIN**, Circuit Judges.

Opinion

BROWN, J., delivered the opinion of the court, in which **MARTIN**, J., joined. **MERRITT**, C.J. (p. 472), delivered a separate concurring opinion.

BAILEY BROWN, Circuit Judge.

The petitioner, Bankers Trust Company, the defendant in a pending securities action, seeks a writ of mandamus to vacate a discovery order directing it to produce to the plaintiff, Procter and Gamble Company, certain documents which constitute or contain "confidential supervisory information" under federal regulations promulgated by the Federal Reserve System.¹ Bankers Trust contends that the discovery order is in error because: 1) Procter and Gamble Company failed to comply with the clearly applicable governing regulations of the Federal Reserve in attempting to obtain the documents from Bankers Trust, and 2) the documents are, in any event, protected by the Federal Reserve's bank examination privilege which the district court refused to consider. We grant the writ in part, vacate the discovery order, and remand the case to the district court with instructions.

***467 I.**

The Procter and Gamble Company ("P & G") sued Bankers Trust and BT Securities Corporation (collectively "Bankers Trust"), alleging fraud, misrepresentation, violations of the Commodities Exchange Act, and various other causes of action arising from two derivative contracts entered into with Bankers Trust. P & G claims approximately \$195 million in damages.

The petition for writ of mandamus focuses on a single discovery issue in this litigation which is otherwise still in the discovery phase. At issue is P & G's demand that Bankers Trust produce all documents submitted to or received from the Federal Reserve, including "any and all documents relating to any and all regulatory reports of examination and inspection which

relate to or refer to Bankers Trust's [leveraged derivative transaction] Business.”² Thus, P & G is seeking Federal Reserve examination reports and documents prepared by both the Federal Reserve and Bankers Trust during the examination process. Bankers Trust contends that the documents P & G seeks are property of the Federal Reserve Board and that under the applicable Board regulations, Bankers Trust is prohibited from disclosing the documents to P & G. Bankers Trust therefore contends that it has been thrust into an untenable position. If it complies with the district court's order, it violates the Board's regulations prohibiting disclosure and risks criminal penalties. If, on the other hand, it does not comply with the court order, it is subject to being held in contempt and to possible sanctions under [Rule 37 of the Federal Rules of Civil Procedure](#).

The relevant regulation in the instant case is 12 C.F.R. § 261 *et seq.* Section 261 first defines “confidential supervisory information” as, among other things, “reports of examination and inspection” as well as “documents prepared by, on behalf of, or for the use of the [Federal Reserve] Board, [or] a Reserve Bank....” [12 C.F.R. § 261.2\(b\)](#). The regulations provide that such information is and shall always remain “the property of the Board.” [12 C.F.R. § 261.11\(g\)](#). The regulations further provide the procedures to be followed to obtain access to confidential supervisory information. A person seeking access shall file a written request with the general counsel of the Board of Governors of the Federal Reserve System. [12 C.F.R. § 261.13\(b\)](#). The general counsel may then approve the request if: 1) the person making the request has shown a substantial need for confidential supervisory information that outweighs the need to maintain confidentiality; and 2) disclosure is consistent with the supervisory and regulatory responsibilities and policies of the Board. [12 C.F.R. § 261.13\(c\)](#). Making a request under this section and a denial thereof is considered to be an exhaustion of administrative remedies for discovery purposes in any civil proceeding. [12 C.F.R. § 261.13\(d\)](#). If a party has exhausted such remedy to no avail, it may then file against the Federal Reserve either a Freedom of Information Act (FOIA) action or subpoena the documents

under [Rule 45 of the Federal Rules of Civil Procedure](#).³ What a party may not do under the procedures set out in the regulations, however, is seek the documents from some other party without the Board's approval or permission. Likewise, any person or organization that has documents which may not be disclosed under these regulations and is served with a “subpoena, order, or other judicial process ... requiring the production of documents or information” is directed to promptly advise the Board's general counsel of such request and must continually “decline to disclose the *468 information....” [12 C.F.R. § 261.14](#). The Federal Reserve contends, in its *amicus curiae* brief, that the procedures set out in the regulations are the exclusive means of obtaining confidential supervisory information.

In this case, P & G made a discovery request in which it asked for documents of Bankers Trust relating to its leveraged derivative business. Bankers Trust objected to the production of the documents, relying on the regulations summarized above. Unknown to Bankers Trust, P & G also had made a written request to the Federal Reserve Board, pursuant to § 261.13 of the regulations, for the documents in question. The Board took the position that any report or document sent by the Federal Reserve to Bankers Trust as part of the examination process, and any document created by Bankers Trust and sent to the Federal Reserve as part of that process, constituted “confidential supervisory information” which could not be disclosed by Bankers Trust. In a letter to P & G, the Board denied P & G's request for the documents on the ground that P & G had not shown a substantial need for the information that outweighed the need to maintain confidentiality. P & G took that letter to be an exhaustion of administrative remedies, and instead of then proceeding directly against the Federal Reserve through a [Rule 45](#) subpoena or FOIA action, it turned to the district court in which its action against Bankers Trust was pending and sought to compel production of the documents directly from Bankers Trust. P & G served a motion to compel production upon Bankers Trust, and a telephonic conference on the motion was conducted by the district court. P & G advised the Board by letter that this conference would be taking place.

The Board, however, did not participate in the conference.

In the conference, the district court made it clear that the Federal Reserve's regulations could in no way interfere with the normal operation of the judicial branch of government. To this end, the court concluded that it was not bound to follow the Board's regulations to the extent that the regulations posed a barrier to the court's ability to control discovery. Thus, because Bankers Trust was in possession of the requested documents, the court concluded that P & G could have discovery of the documents from Bankers Trust. Moreover, the district court did not analyze the documents in question under the bank examination privilege upon which Bankers Trust also relied, because, in the court's opinion, the privilege "doesn't exist." On February 21, 1995, the district court entered an order granting P & G's request to compel production of the documents. It ordered Bankers Trust to produce three categories of documents: 1) all business records or other pre-existing documents which Bankers Trust had submitted to the Board relating to the leveraged derivatives products business; 2) all documents concerning the leveraged derivatives business prepared by Bankers Trust relating to the examination process; and 3) the Federal Reserve's examination reports relating to the leveraged derivatives business. The first two categories were to be turned over to P & G; the last category was to be turned over to the district court for *in camera* inspection.

Bankers Trust now objects to the production of the documents in the latter two categories, and claims that the order is clearly erroneous as a matter of law.⁴ First, Bankers Trust contends that the Board's regulations prohibit it, in all events, from disclosing such documents and dictate that P & G seek the documents in question directly from the Federal Reserve. Second, Bankers Trust alleges that the documents are protected under the Federal Reserve's bank examination privilege, a privilege the existence of which the district court refused to recognize. As stated, the Federal Reserve has filed an *amicus curiae* brief in support of the petition for writ of mandamus.⁵

*469 II.

[1] [2] Mandamus review must be confined to matters of usurpation of judicial power or clear abuse of discretion. *Schlagenhauf v. Holder*, 379 U.S. 104, 111, 85 S.Ct. 234, 238–39, 13 L.Ed.2d 152 (1964). Thus, mandamus is not to be used to reverse a decision made by a court in the exercise of legitimate jurisdiction. *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1140 (6th Cir.1990) (en banc). Moreover, the petitioner has the burden of showing that its right to the issuance of the writ is "clear and undisputable." *Federal Deposit Ins. Corp. v. Ernst & Whinney*, 921 F.2d 83, 86 (6th Cir.1990).

A.

Bankers Trust notes that the Federal Reserve's regulations provide that the documents in question remain the property of its Board, that a party seeking those documents must request them directly from the Federal Reserve, and that any organization or institution in possession of such documents, if called upon to produce them, shall decline to do so pursuant to the regulations. Bankers Trust contends that because the requested documents constitute or contain confidential supervisory material, P & G must obtain them, if at all, from the Federal Reserve, presumably in a separate action in a district court in Washington, D.C., rather than from Bankers Trust. See, e.g., *Colonial Sav. & Loan Ass'n v. St. Paul Fire & Marine Ins. Co.*, 89 F.R.D. 481 (D. Kan.1980) (Regulations of Federal Home Loan Bank Board held valid even though court recognized some hardship in requiring the relief to be sought in the District of Columbia where jurisdiction could be obtained). Bankers Trust therefore contends that because the discovery order is plainly inconsistent with the governing regulations, it is erroneous as a matter of law warranting mandamus relief.

[3] [4] We disagree. As an initial matter, we point out that the discovery order is consistent with the requirements of Rule 34 of the Federal Rules of Civil Procedure. Federal Rule 34(a)

states that: “Any party may serve on any other party a request (1) to produce ... any designated documents ... or to inspect and copy, test, or sample any tangible things ... which are in the possession, custody or control of the party upon whom the request is served.” **FED.R.CIV.P. 34(a)**(emphasis added). Moreover, federal courts have consistently held that documents are deemed to be within the “possession, custody or control” for purposes of **Rule 34** if the party has *actual* possession, custody or control, or has the legal right to obtain the documents on demand. *Resolution Trust Corp. v. Deloitte & Touche*, 145 F.R.D. 108, 110 (D. Colo.1992); *Weck v. Cross*, 88 F.R.D. 325, 327 (N.D. Ill.1980). Thus, legal ownership of the document is not determinative. *In re Sunrise Sec. Litig.*, 109 B.R. 658, 661 (E.D.Pa.1990); *Weck*, 88 F.R.D. at 327. It necessarily follows, then, that parties in possession of documents forwarded to them by a federal agency have “possession, custody or control” within the meaning of **Rule 34**, notwithstanding the fact that the agency by regulation retains ownership and restricts disclosure. See *Resolution Trust Corp.*, 145 F.R.D. at 110 (“**Rule 34**, which focuses on a party's ability to obtain documents on demand ... is not affected by the [federal agency's] retention of ownership or its *unilaterally* imposed restrictions on disclosure.”)(emphasis added). Therefore, because Bankers Trust has possession of the documents in question, and because they appear to be relevant, they are discoverable under the terms of **Rule 34** and P & G should be entitled under that Rule to have discovery of those documents.

We are confronted, however, with a situation in which the Board's regulations conflict with the Federal Rules of Civil Procedure with respect to a district court's authority, under the Federal Rules, to control discovery. **Rule 34**, as enforced through **Rule 37**, clearly authorizes the district court to order Bankers Trust to turn over those documents in its possession while the Board's regulations specifically prohibit such a disclosure.

[5] At bottom, federal regulations should be adhered to and given full force and effect of law whenever possible. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104

S.Ct. 2778, 81 L.Ed.2d 694 (1984). As long as the federal agency's *470 regulation is based upon a permissible construction of the enabling statute, the regulation should be enforced. *Id.* The statutory authorities upon which the Federal Reserve relies, however, simply do not give it the power to promulgate regulations in direct contravention of the Federal Rules of Civil Procedure. Section 261 itself identifies as its statutory authority **12 U.S.C. § 248(i)** and **(k)**, and **5 U.S.C. § 552**. The Federal Reserve also relies upon **5 U.S.C. § 301**, and **12 U.S.C. § 1844(b)**. These statutes are broad, general grants of authority. For example, **12 U.S.C. § 1844(b)** authorizes the Board to issue regulations “as may be necessary to enable [the Federal Reserve] to administer and carry out the purposes of this chapter and prevent evasions thereof.” **12 U.S.C. § 248(i)** provides that the Board “shall perform the duties, functions, or services specified in this chapter, and make all rules and regulations necessary to enable said board effectively to perform the same.” **5 U.S.C. § 301**, which is the most specific of the statutes, provides that the Federal Reserve may prescribe regulations “for the government of his [sic] department, the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of its records, papers, and property.” **Section 301**, however, is nothing more than a general housekeeping statute and does not provide “substantive” rules regulating disclosure of government information. *Exxon Shipping Co. v. United States Dep't of Interior*, 34 F.3d 774 (9th Cir.1994). In *Exxon*, five federal agencies sought to prohibit their employees from testifying in depositions, arguing that **§ 301** authorized it to withhold documents or testimony from federal courts. The court of appeals disagreed. The court noted that according to the legislative history, Congress was concerned that the statute had been “twisted from its original purpose as a ‘housekeeping’ statute into a claim of authority to keep information from the public.” *Id.* at 777 (citation omitted). To correct the situation, Congress amended the statute, adding the following sentence: “This section does not authorize withholding information from the public or limiting the availability of records to the public.” **5 U.S.C. § 301**. Thus, the court concluded that nothing in

the text of the statute empowers a federal agency to withhold documents or testimony from federal courts.

[6] We likewise conclude that Congress did not empower the Federal Reserve to prescribe regulations that direct a party to deliberately disobey a court order, subpoena, or other judicial mechanism requiring the production of information. We therefore hold that the language in [12 C.F.R. § 261.14](#) that requires a party that is served with a subpoena, order, or other judicial process to continually decline to disclose information or testimony exceeds the congressional delegation of authority and cannot be recognized by this court.⁶ Such a regulation is plainly inconsistent with [Rule 34](#) and cannot be enforced. To allow a federal regulation issued by an agency to effectively override the application of the Federal Rules of Civil Procedure and, in essence, divest a court of jurisdiction over discovery, the enabling statute must be more specific than a general grant of authority as found here. *Resolution Trust Corp.*, 145 F.R.D. at 111 (holding that the Federal Rules of Civil Procedure cannot be abrogated by agency regulations); *Merchants Nat'l Bank & Trust Co. v. United States*, 41 F.R.D. 266, 268 (D.N.D.1966) (“While the statute gives the Secretary the right to restrict disclosure, judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”); *Sperandeo v. Milk Drivers & Dairy Employees Local Union No. 537*, 334 F.2d 381, 383 (10th Cir.1964) (holding that federal agencies are bound by discovery rules in the same manner as any other litigant).

Moreover, we find no compelling reason to discard the relatively straightforward discovery methods outlined in the Federal Rules of Civil Procedure simply because the Federal Reserve has attempted to mandate a different *471 procedure. It seems illogical to this court to require P & G to initiate the much more cumbersome procedure of serving a subpoena on the Federal Reserve in Washington, D.C. simply to enable P & G to obtain the same documents that defendant Bankers Trust possesses. P & G would incur needless delays with such maneuvering and would be forced to litigate any

objections to the subpoena before a D.C. district court that may not be as fully informed of the underlying facts and circumstances of the case. Thus, we hold that the district court's discovery order was a legitimate exercise of jurisdiction under [Rule 34](#) and Bankers Trust's first contention of error is without merit.

B.

Having determined that the federal regulations upon which Bankers Trust relies cannot divest the district court of its authority to apply [Rule 34 of the Federal Rules of Civil Procedure](#), we now turn to Bankers Trust's second issue of whether the district court's treatment of the bank examination privilege constitutes clear error warranting mandamus relief. [Rule 26 of the Federal Rules of Civil Procedure](#) provides that “[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action.” [FED.R.CIV.P. 26\(b\)\(1\)](#) (emphasis added). Bankers Trust contends that the requested documents are protected from disclosure by what is referred to as the bank examination privilege.

In issuing the discovery order, the district court stated, citing no authority, that the bank examination privilege “doesn't exist.” Contrary to the district court's belief, however, the privilege does exist and warrants that the court apply the appropriate test for determining whether the privilege should be honored or overridden. *Schreiber v. Society for Sav. Bancorp, Inc.*, 11 F.3d 217 (D.C.Cir.1993); *In re Subpoena Served Upon the Comptroller of the Currency, and the Secretary of the Bd. of Governors of the Fed. Reserve Sys. (In re Subpoena)*, 967 F.2d 630 (D.C.Cir.1992); *Delozier v. First Nat'l Bank*, 113 F.R.D. 522 (E.D.Tenn.1986). We hold that this was clear error and a usurpation of judicial power.

[7] First and foremost, the bank examination privilege is a qualified rather than absolute privilege which accords agency opinions and recommendations and banks' responses thereto protection from disclosure. *Schreiber*, 11 F.3d

at 220. The primary purpose of the privilege is to preserve candor in communications between bankers and examiners, which those parties consider essential to the effective supervision of banking institutions. The privilege is firmly grounded in practical necessity. *In re Subpoena*, 967 F.2d at 633. As the court in *In re Subpoena* explained:

Bank safety and soundness supervision is an iterative process of comment by the regulators and response by the bank. The success of the supervision therefore depends vitally upon the quality of communications between the regulated banking firm and the bank regulatory agency.... Because bank supervision is relatively informal and more or less continuous, so too must be the flow of communication between the bank and the regulatory agency. Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank. These conditions simply could not be met as well if communications between the bank and its regulators were not privileged.

Id. at 634. Thus, the privilege is designed to promote the effective functioning of an agency by allowing the agency and the regulated banks the opportunity to be forthright in all communications.

[8] [9] As stated, however, the privilege is a qualified one. Purely factual material falls outside the privilege, and if relevant, must be produced. *Id.*; *Schreiber*, 11 F.3d at 220. Likewise, the privilege may be overridden as to its protection of deliberative material if good cause is shown.⁷

In this inquiry, the *472 court must balance the “competing interests” of the party seeking the documents and those of the government. *At minimum*, the court must consider:

- 1) the relevance of the evidence sought to be protected;
- 2) the availability of other evidence;
- 3) the ‘seriousness’ of the litigation and the issues involved;
- 4) the role of the government in the litigation; and
- 5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Schreiber, 11 F.3d at 220; *In re Subpoena*, 967 F.2d at 634. While this list does not purport to be an exhaustive list of factors a court might consider, it is at least a floor upon which to balance sufficiently the competing interests of the parties and the federal agency.

We therefore vacate the discovery order inasmuch as the district court failed to weigh whether the privilege should or should not be honored. On remand, the first task of the district court is to determine what documents, or portions thereof, are factual in nature. All factual material, if relevant, must be produced to P & G. The district court must then balance all relevant factors and determine whether the privilege should be honored or overridden as to all other information in the documents in question. We also note that if the privilege is overridden, the district court should consider other possible protective safeguards such as redaction and protective orders to minimize any harm that might otherwise occur from disclosure.

[10] As a final matter, we note that the district court on remand must provide the Federal Reserve with notice and allow the Federal Reserve the opportunity to intervene. The bank examination privilege belongs to the Federal Reserve, and therefore, where a claim of the privilege is appropriate, the Federal Reserve must be allowed

the opportunity to assert the privilege and the opportunity to defend its assertion.

We grant the petition for writ of mandamus in part, vacate the discovery order, and remand the case to the district court for further proceedings consistent with this opinion.

MERRITT, Chief Judge, concurring.

I concur in full in the court's opinion, but I would point out an additional consideration. Even if Congress had given the Federal Reserve Board specific statutory authority—which it certainly has not—to withhold documents that contain “confidential supervisory information” under whatever circumstances the Board deems appropriate (including a situation when a federal court had issued a [Rule 37](#) discovery order), it is questionable whether such a statute would be constitutional. The Supreme Court has indicated that delegations of rulemaking authority to Article I agencies may implicate separation of powers concerns. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). As the Supreme Court has noted “we have not hesitated to strike down provisions of a law that ... undermine the authority and independence of one or another

coordinate Branch.” *Mistretta v. United States*, 488 U.S. 361, 382, 109 S.Ct. 647, 660, 102 L.Ed.2d 714 (1989). As Justice Brennan has observed, “A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.” *Marathon*, 458 U.S. at 58, 102 S.Ct. at 2865 (plurality opinion) (*quoting United States v. Will*, 449 U.S. 200, 217–18, 101 S.Ct. 471, 482, 66 L.Ed.2d 392 (1980)). If Congress were to limit a federal district judge's authority to order discovery according to the interest of the Federal Reserve, the ability of a federal court to perform its most basic function of deciding “cases and controversies” under Article III of the Constitution would be notably impaired. Courts cannot fairly decide cases if they cannot have access to the information needed for a fair, objective decision. Even when National Security is at stake, federal *473 courts still review documents to determine whether disclosure is warranted. *See 18 U.S.C.App. §§ 1–16 (1994)* (Classified Information Procedures Act).

All Citations

61 F.3d 465, 32 Fed.R.Serv.3d 85, 1995 Fed.App. 0235P

Footnotes

- [1](#) Pursuant to the discovery order, the documents were to be turned over on February 24, 1995. Because it appeared that the mandamus petition would be moot in the absence of a stay, however, a panel of this court issued a temporary stay until the mandamus petition is resolved.
- [2](#) The Federal Reserve is charged by Congress to prevent and/or remedy unsafe and unsound banking practices and to ensure economic stability. *See 12 U.S.C. § 301*. Thus, as a condition of membership in the Federal Reserve System, banks are subject to periodic supervisory inspections and examinations by the Federal Reserve. In the course of an annual examination of Bankers Trust, the Federal Reserve did engage in a particularized inquiry with respect to Bankers Trust's derivatives transactions business.
- [3](#) [Rule 45](#) would presumably require P & G to serve a subpoena on the Federal Reserve in Washington, D.C., directing the Federal Reserve to produce the relevant documents in its possession. The Federal Reserve, if it chose to do so, could then rely on any privileges it may be entitled to and litigate those objections before the district court in which the subpoena was filed.
- [4](#) Bankers Trust subsequently received the Federal Reserve's permission to produce the pre-existing business records provided by Bankers Trust to the Federal Reserve, i.e., the first category of documents. Bankers Trust, therefore, is not contesting paragraph 1 of the district court's order which had ordered Bankers Trust to produce such documents.
- [5](#) This court also granted the Federal Reserve permission to present a brief argument and to respond to questions at oral argument.

- 6 We are by no means indicating that the other portions of § 261.14 are likewise unenforceable. To the contrary, we think it advisable if not necessary for a party in litigation that possesses "confidential supervisory information" to inform the Federal Reserve of any requests for production so the Federal Reserve will have notice and the opportunity to intervene and protect any interests, arguments, or concerns it may have.
- 7 The *In re Subpoena* case noted several examples when such a situation may arise, including, for example, exposing "government malfeasance," *In re Franklin Nat'l Bank Sec. Litig.*, 478 F.Supp. 577, 582 (E.D.N.Y.1979), or when the government seeks justice between the litigants. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 407 (D.C.Cir.1984).

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